Case No. 21-1281

In the United States Court of Appeals
for the Tenth Circuit

United States of America,
Plaintiff-Appellee,

v.

Jimcy McGirt,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Oklahoma
The Honorable John F. Heil, III
D.C. Case No. 6:20-cr-00050-JFH-1

Appellant's Opening Brief

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Oral argument is requested.

February 23, 2022

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Prior or Related Appeals:

Mr. McGirt litigated two pro se cases related to the judgment below. In *In re McGirt*, No. 21-7013 (10th Cir. Apr. 29, 2021), this Court denied a writ of prohibition. In *United States v. McGirt*, No. 21-7019 (10th Cir. June 4, 2021), this Court dismissed an interlocutory appeal. Both of these pro se cases involved a claim that the district court lacked jurisdiction. There have not been any other cases in this Court involving Mr. McGirt. Counsel for Mr. McGirt is not aware of any pending cases involving issues similar to those presented in this appeal.

Statement of Jurisdiction

The district court exercised jurisdiction over this criminal case under 18 U.S.C. § 3231.[1] Judgment was entered on August 27, 2021. R. vol. I at 579.[2] Mr. McGirt appealed on September 2, 2021. *Id*. at 586. That was timely under Fed. R. App. P. 4(b)(1)(A)(i). This Court has appellate jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

Issues

1. Whether the district court violated Fed. R. Evid. 801(d)(1)(A) by refusing to allow the jury to consider prior inconsistent testimony for the truth of the matter asserted.

2. Whether the district court plainly erred by using U.S.S.G. § 2A3.1 to determine the offense level for Mr. McGirt's abusive sexual contact conviction, given that (a) § 2A3.1 applies only when the offense is criminal sexual abuse and (b) there is a separate guideline, § 2A3.4, for abusive sexual contact offenses.

Introduction

In 1996, Jimcy McGirt was arrested by a local sheriff's department and charged in Oklahoma state court with three sex crimes. R. vol. II at 49. Mr. McGirt was convicted following a 1997 jury trial and sentenced to life imprisonment. *Id*. Famously, the Supreme Court of the United States overturned Mr. McGirt's convictions more than two decades later. *See McGirt v.*

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[1] In pro se filings, Mr. McGirt has claimed that the trial court lacked jurisdiction. Counsel does not pursue that claim in this brief.

[2] Citations to the record on appeal are to the volume number and then to the page number at the bottom right corner of each page.

Oklahoma, 140 S. Ct. 2452, 2482 (2020). The Court held that Oklahoma state courts "lack[ed] jurisdiction to prosecute Mr. McGirt." *Id*. at 2474. This is because Mr. McGirt is Native American, and a pair of 1830s treaties declare that the eastern Oklahoma location where the offenses allegedly took place is Creek Nation land. *Id*. at 2459.

At the same time that it held that the State of Oklahoma lacked jurisdiction, the Supreme Court stated that the federal government does have jurisdiction to prosecute offenses like those charged against Mr. McGirt. *Id*. at 2478, 2480. Predictably, after the Supreme Court's decision, federal prosecutors charged Mr. McGirt with two counts of aggravated sexual abuse, in violation of 18 U.S.C. § 2241 (1996), and one count of abusive sexual contact, in violation of 18 U.S.C. § 2244 (1996). Following a jury trial in federal court, Mr. McGirt was convicted of all three counts. The district court imposed a sentence of life imprisonment.

Compared to Mr. McGirt's last appeal, this one presents issues that are less epic but no less meritorious. First, Mr. McGirt maintains that he should be granted a new trial because the district court violated Fed. R. Evid. 801(d)(1)(A) when it instructed the jurors that they could only consider prior inconsistent testimony for purposes of impeachment, rather than as substantive evidence. Second, and in the alternative, Mr. McGirt contends that he should be granted a resentencing because the district court committed a plain error in determining his sentence: it used the wrong sentencing guide-

line to calculate the offense level for Mr. McGirt's abusive sexual contact conviction, which in turn inflated the overall Guidelines range. For these reasons, developed further below, this Court should vacate the judgment against Mr. McGirt.

Statement of the Case

I. Mr. McGirt Is Convicted Following a Jury Trial at Which the Judge Refused to Allow the Jury to Consider Prior Inconsistent Testimony as Substantive Evidence.

A. The government's case

The government alleged by superseding indictment that, between August 8th and August 15th of 1996, Mr. McGirt committed three sex crimes against B.C.,[3] who was three or four years old at the time. R. vol. I at 144–45, vol. III at 216. Several years earlier, Mr. McGirt had married B.C.'s grandmother, Norma Blackburn, and moved into her home. R. vol. III at 342, 409. During the week that the abuse allegedly occurred, B.C.'s mother, De Ette Kuswane, had gone on vacation and left B.C. to stay with Ms. Blackburn and Mr. McGirt. *Id*. at 303.

[3] The surnames of several persons involved in this case changed between 1996 and the 2020 trial. For the sake of clarity, this Brief uses the names and initials from the 2020 trial transcript. "B.C." is the same person as "B.B.," which is how the alleged victim is named in the superseding indictment and at other places in the record. *See* R. vol. I at 144–45, 431–33.

The prosecution's case at the 2020 trial relied primarily on the testimony of Ms. Blackburn, Ms. Kuswane, and B.C. (who was by then 28 years old).

B.C. testified that, although she was just three or four years old, she remembers being sexually abused by Mr. McGirt.[4] R. vol. III at 217, 229–30, 282. B.C. described the time and manner of the abuse consistent with what was alleged in the superseding indictment. *Compare* R. vol. I at 144–45, *with* R. vol. III at 220–25. B.C. testified that the abuse occurred while her grandmother, Ms. Blackburn, was at work. R. vol. III at 219. She said that she told several people about the abuse afterwards, including her mother. *Id*. at 226–27.

B.C.'s mother, Ms. Kuswane, testified that, about two weeks after she returned from vacation, B.C. told her about some things that had "occurred with herself and the defendant." R. vol. III at 308–10, 370–71. What B.C. described, if true, would be sexual assault. *Id*. at 367. Ms. Kuswane also testified that B.C.'s behavior was different after she returned from vacation—that B.C. became very clingy and would have uncharacteristic outbursts and temper tantrums. *Id*. at 312–13. Ms. Kuswane sought advice from a counselor and, ultimately, went to the police. *Id*. at 315. Ms. Kuswane testified that,

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[4] This Brief does not describe the exact factual allegations underlying the charges. If the Court requires more information, the details are set forth at several places in the record on appeal. *See, e.g.*, R. vol. I at 505–06 (prosecution's sentencing statement), vol. II at 40–42 (presentence report), vol. III at 220–25 (trial testimony).

during the legal proceedings that ensued, B.C. would become very upset when she saw Mr. McGirt. *Id*. at 323. In addition, Ms. Kuswane claimed that, several years after the original trial, she discovered a letter that Mr. McGirt had written to B.C.'s grandmother in which Mr. McGirt confessed. *Id*. at 324–26. (No such letter was produced at trial.)

Finally, the prosecution called B.C.'s grandmother, Ms. Blackburn. As both sides recognized, Ms. Blackburn (who was elderly by the time of the 2020 trial) appeared to have cognitive difficulties that affected her ability to testify. R. vol. III at 425–26, 459. Ms. Blackburn told the jury that she learned of B.C.'s statements about Mr. McGirt through a phone call from B.C.'s mother and aunt. *Id*. at 420. Ms. Blackburn said that she confronted Mr. McGirt about the accusation, and he denied it. *Id*. at 421. Ms. Blackburn initially stuck by Mr. McGirt, and during the previous trial, she testified on his behalf. *Id*. at 423. In the 2020 trial, Ms. Blackburn echoed Ms. Kuswane's claim that Mr. McGirt later sent her a letter that amounted to a confession. *Id*. at 430. Ms. Blackburn subsequently obtained a divorce from Mr. McGirt. *Id*. at 431.

B. The defense's case

The defense challenged the prosecution's evidence on a number of grounds, ultimately suggesting that this was a case of confabulated memory. *See, e.g.*, R. vol. I at 128–29, 240–41, 574–75. Defense counsel pointed out that there was no physical or medical evidence to support the charges. *Id*. at 128–29, 566–71. They contested Ms. Kuswane's credibility and posited that her

daughter's allegations were rooted in Ms. Kuswane's preexisting hostility towards Mr. McGirt. *Id*. at 125–30, 240, 567–71. While suggesting that B.C.'s memories were not reliable, *id*. at 238–40, 286–87, defense counsel sought to show that, contrary to Ms. Kuswane's testimony, B.C.'s actual behavior during the relevant period was inconsistent with the allegations of abuse. *Id*. at 127–30, 572. Finally, the defense tried to establish that the abuse could not have happened as alleged because Mr. McGirt was rarely, if ever, alone with B.C. *Id*. at 127, 290–94, 453, 570.

To prove its case, the defense relied heavily on testimony that the prosecution's witnesses had given during the state court proceedings two decades earlier. The defense's use of such prior testimony was too pervasive to comprehensively describe here. During this relatively brief trial, defense counsel read into the record (or, on a handful of occasions, elicited a summary of) 28 passages of favorable prior testimony.[5] The following examples give a sense of how Mr. McGirt relied on prior testimony to support his theory of defense:

- B.C. testified during the 1997 trial that her mother told her to say that Mr. McGirt did these things to her and told her what to say in court, R. vol. III at 240–41—which was contrary to her 2020 testimony that her mother did not tell her what to say, *id*. at 239.

[5] R. vol. III at 235, 238, 240, 241, 254–55, 259, 286, 290, 291, 293–94, 356, 370, 372–73, 379–80, 383–84, 441, 442:8–10, 442:20–25, 444:2–8, 444:16–20, 446, 448, 450, 452, 453, 456, 457, 467.

- B.C. previously testified that she had made similar allegations against another man, Bill Gray, *id*. at 238—which was inconsistent with her 2020 testimony that she made no such allegations, *id*. at 234–35.
- B.C. testified during prior proceedings that her uncle Matthew lived in the home at the time and was at home when the abuse allegedly occurred. *Id*. at 290, 293. This was different from her 2020 testimony that she was not sure whether Matthew was living in the home and that he was not there at the time, *id*. at 218, 289–90.
- Ms. Kuswane (B.C.'s mother) previously testified that she had learned that, while she was on vacation, B.C. spent at least one day at her father's home—in contrast to her 2020 testimony that she had no knowledge of that. *Id*. at 355–58.
- Ms. Kuswane testified during prior proceedings that she had repeatedly discussed the alleged abuse with B.C.—in contrast to her 2020 testimony that she did not discuss it with her. *Id*. at 383–84.
- Ms. Blackburn (B.C.'s grandmother and Mr. McGirt's then-spouse) testified during the 1997 trial that Ms. Kuswane had begun displaying hostility towards Mr. McGirt years before the summer of 1996 and had repeatedly asked Ms. Blackburn to leave Mr. McGirt. *Id*. at 443–46. This was contrary to her 2020 testimony that the hostilities began afterwards. *Id*.
- Ms. Blackburn testified during the state-court proceedings that B.C. spent three days at her father's house while her mother was on vacation, *id*. at 453, which was inconsistent with her repeated insistence in 2020 that B.C.'s father did not have any house for her to go to, *id*. at 453–55.
- Ms. Blackburn previously testified that she never saw B.C. display any physical or behavioral indications of abuse—such as withdrawing, crying, tantrums, or fear of Mr. McGirt. *Id*. at 450, 456, 467. Her 2020 testimony was precisely the opposite. *Id*. at 449, 455, 465.

The prosecution did not interpose a hearsay objection to this prior testimony, and it did not request a limiting instruction that the testimony be used only as impeachment.

C. The judge's refusal to allow the jury to consider the prior testimony as substantive evidence

Before the parties conducted their jury instructions conference, defense counsel filed a proposed instruction regarding the jury's use of prior inconsistent statements. R. vol. I at 404–05, vol. III at 519. Defense counsel's proposal was to instruct the jury that, when a prior inconsistent statement was "made under oath, you may use it not only to help you decide whether you believe the witness's testimony in this trial, but also as evidence of the truth of what the witness said in the earlier statement." R. vol. I at 404–05. Defense counsel indicated that they were relying on Fed. R. Evid. 801(d)(1)(A) for this proposed instruction. They did so by citing *United States v. Vance*, 216 F. App'x 360 (4th Cir. 2007), and by explicitly noting in a parenthetical that *Vance*, in turn, relied on Rule 801(d)(1)(A). R. vol. I at 405.[6] The prosecution did not file a response to the defense's proposed instruction.

[6] The *Vance* case states: "Rule 801(d)(1)(A) excludes from the definition of hearsay prior inconsistent statements by a witness that were given under oath subject to the penalty of perjury, as long as the witness may be cross-examined concerning the statements. . . . Therefore, the district court did not abuse its discretion in admitting [a witness's] grand jury testimony for both impeachment and substantive purposes." 216 F. App'x at 361–62.

During the jury instructions conference, defense counsel orally objected to an inconsistent-statement instruction put forward by the trial court, which contemplated instructing the jury that all prior inconsistent statements could be considered solely as impeachment and not as proof of anything other than the believability of the witness. R. vol. III at 518–20. Defense counsel asked that all language limiting the jury's use of prior testimony be stricken and that the court include a paragraph stating that the prior testimony could be used for the truth of the matter asserted. *Id*. Defense counsel also noted that they had submitted a proposed instruction regarding prior inconsistent testimony and maintained "that that instruction should be submitted in its entirety." *Id*. at 519. The court stated that the parties would revisit the inconsistent-statement instruction after making a first pass through the remainder of the court's proposed instructions. *Id*. at 520.

After the parties made a first pass through the court's proposed instructions, an attorney for Mr. McGirt stated the following: "I know [co-counsel] previously submitted . . . proposed instructions. We ask that all of those instructions be given; note our objection to any of the instructions that are not given." *Id*. at 531. Thereafter, the judge asked whether defense counsel had anything further regarding the court's proposal to instruct the jury that it could consider any prior inconsistent statements solely for purposes of impeachment. *Id*. at 533. Defense counsel said the following:

> I believe that the prior testimony was under oath, and we established that their testimony was under oath, and I believe that

> prior sworn testimony that is utilized for impeachment can be used as direct evidence of guilt or innocence, notwithstanding that it can be used for impeachment as well.
>
> So we would ask that that second sentence, you cannot use it as proof of anything else, we believe it could also be used for direct evidence in federal court.

Id. at 533–34.

The prosecution stood silent and did not make any argument or other comment regarding the jury's use of the prior inconsistent testimony.

The judge ruled as follows, without further explanation: "That objection will be noted and overruled." *Id*. at 534.

The trial court thereafter instructed the jury as follows:

> You have heard the testimony of a number of witnesses, including [B.C.], DeEtte Kuswane and Norma Blackburn. You have also heard that, before this trial, they have made statements that differed from their testimony here in court.
>
> The earlier statements were brought to your attention only to help you decide how believable their testimony in this trial was. You cannot use it as proof of anything else. You can only use it as one way of evaluating their testimony here in court.

R. vol. I at 427.

After receiving this instruction, along with its other instructions, the jury convicted Mr. McGirt of all three counts. *Id*. at 445–47.

II. The Judge Sentences Mr. McGirt to Life Imprisonment Using a Guidelines Calculation That Treated an Abusive Sexual Contact Conviction as if it Were a Criminal Sexual Abuse Conviction.

A presentence report filed after the guilty verdicts calculated an adjusted offense level of 33 for each of Mr. McGirt's three convictions. R. vol. II

at 45–46. The report used U.S.S.G. § 2A3.1[7]—the guideline for criminal sexual abuse—for all three computations. *Id*. Pursuant to U.S.S.G. § 3D1.4, the determination that Mr. McGirt had sustained three convictions with similar offense levels resulted in a three-level upward adjustment from the highest individual adjusted offense level (i.e., 33). *Id.* This produced a combined offense level of 36 and a Guidelines range of 210–262 months' imprisonment. *Id*. at 46, 53.

However, although two of Mr. McGirt's convictions (Counts One and Two) were for criminal sexual abuse, the third conviction (Count Three) was for abusive sexual *contact*. R. vol. I at 431–33, 445–47. The abusive sexual contact conviction was subject to U.S.S.G. § 2A3.4 rather than § 2A3.1—and should have carried an adjusted offense level far lower than 33. Mr. McGirt did not object to the presentence report's use of § 2A3.1 to compute the adjusted offense level for his sexual contact conviction, and the district court adopted the report's Guidelines calculations without change. R. vol. II at 63.

At the sentencing hearing, the district court varied upwards from the Guidelines range and imposed a sentence of life imprisonment. R. vol. III at 68. The court cited a number of aggravating factors in support of its decision, including the heinous character of the alleged offenses, the suffering that

[7] All citations to the Sentencing Guidelines are to the 1995 Guidelines—which the presentence report used. *See* R. vol. II at 44; *see generally Peugh v. United States*, 569 U.S. 530 (2013). The 1995 Guidelines are available at the following web address: https://www.ussc.gov/guidelines/archive/1995-federal-sentencing-guidelines-manual.

B.C. has endured as a result of Mr. McGirt's alleged actions, and the court's view that the defendant lacked remorse and posed a high risk of recidivism. *Id*. at 72. Although it varied upwards, the district court nevertheless made clear that it had factored the Guidelines range into its decision regarding the appropriate sentence. The court stated that it had used the Guidelines range as "the starting point and the initial benchmark" and then, after determining that a variance was warranted, had evaluated whether "the extent of the [contemplated] deviation" had a "justification [that was] sufficiently compelling to support the degree of the variance." R. vol. III at 56–57. Later, the court stated that, despite varying from the Guidelines range, it had "considered the sentencing guidelines along with all the factors set forth in Title 18, U.S.C., Section 3553(a) to reach an appropriate and reasonable sentence in this case." *Id*. at 71–72. The court further stated that it had "taken into consideration the sentencing guideline calculations contained within the presentence report." *Id*. at 72.

This appeal followed.

Summary of Argument

Mr. McGirt's convictions should be vacated because the district court committed a serious evidentiary error at trial. In support of his defense at trial, Mr. McGirt relied on the prior inconsistent testimony of three prosecution witnesses. The prior testimony that Mr. McGirt relied upon had been given during a preliminary hearing and jury trial in state court in 1997. This 1997 testimony was not only inconsistent with the prosecution's witnesses'

2020 testimony; it was also affirmatively exculpatory. Accordingly, Mr. McGirt sought to use it not only as impeachment, but also as substantive evidence—to prove the truth of the matter asserted in the 1997 testimony. Over Mr. McGirt's objections, the district court instructed the jury that it could not consider prior inconsistent statements as substantive evidence—i.e., that it could only consider the statements to assess the credibility of the testimony in the present trial, and not as proof of anything else. This was mistaken. Under Fed. R. Evid. 801(d)(1)(A), prior inconsistent testimony is not hearsay and may be considered as proof of the truth of the matter asserted in the prior testimony. The district court's instruction to the contrary was predicated on an error of law and, therefore, amounted to an abuse of discretion. Mr. McGirt should be granted a new trial.

In the alternative, Mr. McGirt's sentences should be vacated because the district court miscalculated the Guidelines range. The district court mistakenly used U.S.S.G. § 2A3.1—the guideline for criminal sexual abuse—to compute the adjusted offense level for Count Three. That was wrong because Count Three was a conviction for abusive sexual contact, not criminal sexual abuse. The guideline for abusive sexual contact offenses is U.S.S.G. § 2A3.4, not § 2A3.1. Although Mr. McGirt did not object to this Guidelines error, he can satisfy the requirements of plain-error review. The text and commentary of the Sentencing Guidelines, as well as this Court's precedent, make it unmistakably clear that the district court's use of § 2A3.1, rather than § 2A3.4, was erroneous. In addition, the district court's error affected Mr. McGirt's

substantial rights and seriously affected the fairness, integrity, and public reputation of the proceedings. Had the district court used § 2A3.4 to compute the adjusted offense level for Count Three—as it was supposed to do—the combined Guidelines range for all of Mr. McGirt's convictions would have been lower. Such a miscalculation of the Guidelines range is presumptively prejudicial even where, as here, the district court ultimately sentences the defendant outside of the Guidelines range. Similarly, a miscalculation of the Guidelines range presumptively undermines the fairness, integrity, and public reputation of the proceedings—regardless of the defendant's ultimate sentence. Nothing in this record rebuts those presumptions. Accordingly, if the Court does not grant Mr. McGirt a new trial, it should order a resentencing with a corrected Guidelines calculation.

Argument

I. The Trial Judge Erred by Refusing to Allow the Jury to Consider Prior Inconsistent Testimony for the Truth of the Matter Asserted.

Under Fed. R. Evid. 801(d)(1)(A), prior inconsistent testimony is not hearsay and may be considered as substantive evidence. Over the defense's objection, the district court instructed the jury that it could consider prior inconsistent testimony only to assess the credibility of the witnesses' 2020 testimony, not as proof of anything else. This was erroneous, and Mr. McGirt should be granted a new trial at which the jury is permitted to consider the prior testimony for the truth of the matter asserted.

A. Preservation and standard of review

As detailed in Section I.C of Mr. McGirt's Statement of the Case, *supra*, he plainly preserved this issue. Defense counsel objected to an instruction that restricted the jury's use of all prior inconsistent statements. R. vol. III at 518–20, 533–34. Counsel argued that such an instruction was improper because one class of prior inconsistent statements—prior testimony—can also be used as substantive evidence. *Id*. at 533–34. They proposed (and specifically asked the trial court to give) an alternative jury instruction that prior inconsistent testimony could be considered as evidence of the truth of the matter asserted. R. vol. I at 404–05, vol. III at 519, 531. And they specified that they were relying on Rule 801(d)(1)(A) as authority for such an instruction. R. vol. I at 405.

Where, as here, a challenge to a trial court's evidentiary decision is preserved, this Court reviews for abuse of discretion. *See United States v. Chavez*, 976 F.3d 1178, 1193 (10th Cir. 2020). Likewise, a preserved challenge to a trial court's decision to grant or reject a particular jury instruction is reviewed for abuse of discretion. *See Allison v. Bank One-Denver*, 289 F.3d 1223, 1241 (10th Cir. 2002). Under the abuse-of-discretion standard, this Court will reverse a trial court's ruling if it rests on "an erroneous conclusion of law" or if it "manifests a clear error of judgment." *Boardwalk Apartments, L.C. v. State Auto Prop. & Cas. Ins. Co.*, 816 F.3d 1284, 1289 (10th Cir. 2016). Abuse-of-discretion review entails de novo review of any legal conclusions underlying the district court's exercise of discretion. *United States v. Ray*, 704 F.3d 1307,

1315 (10th Cir. 2013); *see Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1154 (10th Cir. 2012) ("We review a district court's decision to give a particular jury instruction for abuse of discretion, but we review de novo legal objections to the jury instructions.") (quotation marks omitted).

B. Discussion

The district court committed an error of law and made a clear error of judgment when it instructed the jury, contrary to Fed. R. Evid. 801(d)(1)(A), that prior inconsistent testimony could not be considered for any purpose other than as impeachment.

Generally speaking, a statement that "the declarant does not make while testifying at the current trial" is hearsay if "offer[ed] . . . to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). As a result, many prior inconsistent statements are admissible only as impeachment of the witness's credibility, not as substantive evidence that what the witness previously said is the truth. *See, e.g.*, *United States v. Johnson*, 977 F.2d 1360, 1381–82 (10th Cir. 1992). But prior inconsistent *testimony* is different. Rule 801 provides a number of exclusions from the general definition of hearsay set forth above. One of these states that a witness's prior statement "is not hearsay" if: (1) the prior statement is "inconsistent with the [witness's] testimony" at the current trial, (2) the prior statement "was given under penalty of perjury at a trial, hearing, or other proceeding," and (3) the witness "is subject to cross-examination about [the] prior statement." Fed. R. Evid. 801(d)(1)(A).

Because it is not hearsay, such prior inconsistent testimony is admissible for the truth of the matter asserted, not merely as impeachment. *See Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 651 (10th Cir. 2008) ("[P]ursuant to Fed. R. Evid. 801(d)(1)(A), prior inconsistent statements made under oath are not considered hearsay and may be admitted both for impeachment purposes and substantive consideration where the declarant is subject to cross-examination concerning the statement."); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988) ("[B]ecause Shatswell's prior statements were given under oath and he was subject to cross-examination at trial, the prior inconsistent statements were not hearsay, and were admissible as substantive evidence."). The difference between mere impeachment and substantive evidence is the difference between a shield and a sword. Impeachment evidence can never do more than "block" an opponent's witness's testimony—to leave things as if the witness never said anything. *See United States v. Ragghianti*, 560 F.2d 1376, 1381 (9th Cir. 1977) (explaining that the "maximum legitimate effect" of evidence admitted for impeachment "can never be more than the cancellation of" the testimony impeached). But Rule 801(d)(1)(A) statements put the proponent on offense: they can serve as affirmative support for the proponent's case, effectively turning an opponent's witnesses against them. *See United States v. Whitaker*, 619 F.2d 1142, 1149 (5th Cir. 1980) (Rule 801(d)(1)(A) statement introduced by the prosecution qualified as proof beyond a reasonable doubt).

In Mr. McGirt's case, each of Rule 801(d)(1)(A)'s foundational requirements was present. Indeed, there was never any dispute about this. The prior statements at issue were inconsistent with the witnesses' testimony during the current trial; they were given under oath at a prior trial or hearing; and they were the subject of cross-examination during the current trial.

First, as detailed in Section I.B. of Mr. McGirt's Statement of the Case, *supra*, the prior statements of B.C., Ms. Kuswane, and Ms. Blackburn that the defense introduced were inconsistent with the testimony they offered in the 2020 trial. Many of the prior statements were diametrically opposed to the witnesses' 2020 testimony. For example, in 2020, Ms. Blackburn (B.C.'s grandmother) answered "yes" to the question of whether she "ever witness[ed] [B.C.] being afraid of Mr. McGirt." R. vol. III at 449. In 1997, by contrast, she said, "I have never witnessed her being afraid of him." *Id*. at 450. Likewise, in 2020, B.C. answered "no" to the following question: "Did your mom ever tell you what to say when you were testifying in court?" *Id*. at 239. In 1997, she answered "yes" to the following question: "Did your mom tell you what to say here in court today?" *Id*. at 240.

But "inconsistency is not limited to [such] diametrically opposed answers"; it may also be found "in evasive answers, inability to recall, silence, or changes in position." *United States v. Matlock*, 109 F.3d 1313, 1319 (8th Cir. 1997). "[T]he requirement of inconsistency can be satisfied if a statement simply conflicts by implication with trial testimony, even though what was said before and what is said now can be more or less squared." 4 Christopher

Mueller and Laird Kirkpatrick, FEDERAL EVIDENCE § 8:35 (4th ed. 2021). Thus, statements like those that Ms. Blackburn gave about how B.C.'s mother (De Ette Kuswane) felt about Ms. Blackburn's marriage to Mr. McGirt satisfied Rule 801(d)(1)(A)'s inconsistency requirement. In 2020, Ms. Blackburn answered a question about whether "De Ette ever ask[ed] [her] to leave Mr. McGirt" as follows: "No. Not right away, no. She thought that I was happy but things deteriorated." R. vol. III at 444. This was hardly the same as Ms. Blackburn's 1997 answer to the same question: "Yes . . . . Too many times to count." *Id*.

In addition, as indicated above, "[a] witness's statement that he or she has no recollection of the subject may be treated as 'inconsistent' with a former statement concerning the now-forgotten matter." 5 WEINSTEIN'S FEDERAL EVIDENCE § 801.21 (2021); *see, e.g.*, *United States v. Gajo*, 290 F.3d 922, 930–32 (7th Cir. 2002).[8] Thus, for example, Ms. Kuswane's 2020 testimony

[8] In *United States v. Knox*, this Court affirmed the admission of prior testimony where the witnesses' claim that they lacked memory was contrived. 124 F.3d 1360, 1364 (10th Cir. 1997). So far as undersigned counsel's research reveals, this Court has never addressed the question presented in *Gajo* and similar cases—i.e., whether a genuine lack of memory can suffice to establish inconsistency for purposes of Rule 801(d)(1)(A). As *Gajo* and other courts have recognized, even a genuine failure to remember should be enough to permit the introduction of prior testimony. *See also* 4 Mueller & Kirkpatrick, *supra*, § 8:35 ("[C]laimed lack of memory at trial usually is enough to support a conclusion that a prior positive statement is inconsistent, and showing that the trial position is feigned amounts to gilding the lily, or an additional argument in favor of finding inconsistency, but it is not necessary."). This is

that she did not know whether B.C. went to her father's home on one of the days that Ms. Kuswane was on vacation was inconsistent with her 1997 statement that, on the day in question, "she got to go to her father's." R. vol. III at 355–56. Similarly, Ms. Blackburn's 2020 testimony that she did not remember B.C. staying with her father for three of the days was inconsistent with her 1997 statement that B.C. "went over to her father's . . . about three different days because . . . I picked her up from there [after work]." *Id*. at 457.

Notably, the trial judge himself determined that at least some of the witnesses' prior statements were inconsistent. He gave an instruction labeled "**IMPEACHMENT BY PRIOR INCONSISTENCIES**," and he told the jurors that they had heard evidence "that, before this trial, [the prosecution's witnesses] ha[d] made statements that differed from their testimony here in court." R. vol. I at 427. Accordingly, the first foundational requirement of Rule 801(d)(1)(A) was met: Mr. McGirt introduced prior statements that were inconsistent with the witnesses' testimony at trial.

The remaining two requirements—that the prior inconsistent statements were prior *testimony* and that the witnesses were subject to cross-examination about the prior testimony—can be more quickly established. The

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because (1) the phrase "inconsistent with" in Rule 801(d)(1)(A) has always been liberally construed, (2) admitting prior testimony given at a time when a forgetful witness's memory was fresh promotes the truthseeking function of trials, and (3) it would be difficult to administer a rule that required trial courts to divine whether a lack of memory is real or feigned.

district court was provided transcripts showing that the inconsistent statements were made under oath during a prior trial or hearing. R. vol. I at 32, 56, 84, vol. III at 235, 267–76, 292, 398. Further, the witnesses were not merely "*subject to* cross-examination about [the] prior statement[s]," Fed. R. Evid. 801(d)(1). They were *actually* cross-examined about every one of the prior statements. *See supra* n.5.

Accordingly, the prior inconsistent statements that Mr. McGirt presented were not hearsay. They were not limited to use as impeachment. Instead, they were admissible for the truth of the matter asserted.

Despite this, the judge gave a strict limiting instruction. He told the jurors that the witnesses' prior inconsistent statements were "brought to [their] attention only to help [them] decide how believable [the witnesses'] testimony in this trial was." R. vol. I at 427. The judge further instructed the jury: "You cannot use [the prior inconsistent statements] as proof of anything else. You can only use [them] as one way of evaluating [the witnesses'] testimony here in court." *Id*. In addition, the trial court refused defense counsel's request for an instruction that distinguished prior inconsistent *testimony* and that informed the jury that it could consider prior inconsistent testimony for the truth of the matter asserted. R. vol. I at 404–05, vol. III at 518–20, 531–34.

In doing so, the district court committed an error of law and made a clear error of judgment. When a jury has heard prior inconsistent testimony, an instruction that the jury may consider any inconsistent statements only

for impeachment purposes is legally erroneous. *See United States v. Ricketts*, 317 F.3d 540, 544 (6th Cir. 2003) (jury instruction that prior inconsistent statements could be considered only as impeachment, which "failed to distinguish between sworn statements that could be used as substantive evidence and unsworn statements that could not," was "not a correct statement of the law for the facts in th[e] case"). Accordingly, the district court abused its discretion, and Mr. McGirt should be granted a new trial.

II. The Sentencing Judge Plainly Erred by Using the Guideline for Criminal Sexual Abuse to Compute the Offense Level for Mr. McGirt's Abusive Sexual Contact Offense.

If this Court does not grant Mr. McGirt a new trial, it should grant him a resentencing. The district court plainly erred by using the wrong guideline—U.S.S.G. § 2A3.1 rather than § 2A3.4—to calculate the adjusted offense level for Mr. McGirt's abusive sexual contact conviction. Because this plain error affected Mr. McGirt's overall guidelines range, a resentencing on all three counts is required.

A. Preservation and standard of review

Mr. McGirt did not object to the district court's use of § 2A3.1 to compute the offense level for his abusive sexual contact conviction. His argument is not preserved for appeal. That means this Court reviews Mr. McGirt's sentencing claim for plain error. Under the plain error standard, Mr. McGirt "must show that (1) the district court erred, (2) the error was

plain, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Miller*, 978 F.3d 746, 757 (10th Cir. 2020). Mr. McGirt can establish all four elements.

B. Discussion

1. Error

The district court erred in applying § 2A3.1 to calculate the offense level for Mr. McGirt's abusive sexual contact offense because the correct guideline for an abusive sexual contact offense is § 2A3.4.

The statutory framework that applies to Mr. McGirt's 1996 offenses distinguishes between sex offenses against children that involve a "sexual act" and those that involve "sexual contact." Crimes involving a criminal "sexual act"[9] against children constitute sexual abuse in violation of 18

[9] "Sexual act" is defined as: "(A) contact between the penis and the vulva or the penis and the anus, and . . . contact involving the penis occurs upon penetration, however, slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(2) (1996).

U.S.C. § 2241(c) (1996) and are punishable by life imprisonment. Crimes involving "sexual contact"[10] against children constitute abusive sexual contact in violation of 18 U.S.C. § 2244(a)(1) (1996) and are punishable by imprisonment of "not more than ten years."[11]

Tracking the statutory framework, the 1995 Sentencing Guidelines, which apply to this case pursuant to *Peugh v. United States*, 569 U.S. 530 (2013), have different provisions for § 2241 and § 2244 convictions.

The Statutory Index to the 1995 Guidelines Manual (Appendix A) lists § 2A3.1 as the guideline applicable for convictions under 18 U.S.C. § 2241

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[10] "Sexual contact" means "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3) (1996).

[11] The life sentence that the district court imposed for Count Three (R. vol. I at 580) far exceeds the ten-year statutory maximum applicable to that count under § 2244(a)(1) (1996). The district court—following the lead of the superseding indictment (R. vol. I at 145)—purported to impose a life sentence under § 2244(a)(5). R. vol. I at 579. But § 2244(a)(5) did not exist at the time of the 1996 offenses in this case. It was enacted for the first time ten years later. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 206, 120 Stat. 587. Thus, § 2244(a)(5) cannot be applied to Mr. McGirt consistent with the Ex Post Facto Clause. Mr. McGirt has not raised the illegal sentence on Count Three as a separate issue on appeal because, standing alone, that error is not prejudicial, given the concurrent life sentences on Counts One and Two. But because this Court needs to vacate the judgment against Mr. McGirt on the other grounds argued in this brief, the Court should also instruct the district court that any sentence imposed on Count Three must comply with the ten-year statutory maximum in 18 U.S.C. § 2244(a)(1) (1996).

(aggravated sexual abuse) and § 2242 (sexual abuse). Consistent with the statutory names of those offenses, the title of § 2A3.1 is "Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse." The commentary to § 2A3.1 reiterates that the "Statutory Provisions" to which it applies are 18 U.S.C. §§ 2241 and 2242. Thus, § 2A3.1 applies to sexual abuse convictions—i.e., to offenses involving a "sexual act."

The Statutory Index lists a separate guideline—§ 2A3.4—as the one that applies to convictions under 18 U.S.C. § 2244. Consistent with the statutory name for § 2244 offenses, the title of § 2A3.4 is "Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact." The commentary to that guideline states that the "Statutory Provisions" to which it applies are 18 U.S.C. § 2244(a)(1), (2), and (3). The commentary further states that § 2A3.4 "covers abusive sexual contact not amounting to criminal sexual abuse"—i.e., sex crimes that do not involve a "sexual act." Significantly, § 2A3.4 provides substantially lower offense levels than § 2A3.1.

In Mr. McGirt's case, the district court used § 2A3.1 to compute the offense level for all three of Mr. McGirt's convictions. R. vol. II at 45–46, 63. This was erroneous. Counts One and Two indeed were convictions for § 2241 violations—i.e., for "Aggravated Sexual Abuse" involving "a sexual act." R. vol. I at 431–32, 445–446. But Count Three was a § 2244 offense—i.e., for "Abusive Sexual Contact" not involving a sexual act. R. vol. I at 433, 447. As explained above, U.S.S.G. § 2A3.4, not § 2A3.1, applies to convictions for abusive sexual contact.

Admittedly, the abusive sexual contact guideline does contain a cross-reference (§ 2A3.4(c)(1)) that directs courts to apply the sexual abuse guideline (§ 2A3.1) if the defendant actually committed sexual abuse, even if he was only convicted of committing sexual contact. But that cross-reference does not apply here. The district court did not purport to apply the cross-reference and never found that the conduct underlying Count Three was other than what the jury convicted Mr. McGirt of doing. And that's for a good reason. The actual conduct underlying Count Three was clearly sexual contact, not sexual abuse. *Compare* R. vol. III at 224, *with* 18 U.S.C. § 2246 (1996).

Accordingly, the first element of the plain error standard is satisfied: the district court erred in applying § 2A3.1 to determine the offense level for Count Three.

2. Plainness

Turning to the second prong of the plain error standard, the district court's erroneous application of § 2A3.1 to Count Three is plain. Even absent circuit precedent, a clearly erroneous application of the Sentencing Guidelines amounts to plain error. *See United States v. Brown*, 316 F.3d 1151, 1158 (10th Cir. 2003). Here, the Statutory Index, the title of the relevant guidelines, and the applicable commentary leave no doubt that § 2A3.4 is the guideline applicable to offenses like Count Three—that is, to offenses involving sexual contact rather than a sexual act. This Court's decision in *United States v. Platero*, 996 F.3d 1060 (10th Cir. 2021), reinforces the point. In *Platero*, this Court

explained: "The applicable guideline for convictions under §§ 2241 and 2242 is USSG § 2A3.1 . . . ; and the applicable guideline for [a] conviction under § 2244 is § 2A3.4, entitled, "Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact." *Id*. at 1063. Therefore, the district court's error is plain—i.e., "clear or obvious under current law." *Brown*, 316 F.3d at 1158.

3. Effect on substantial rights

Mr. McGirt can also satisfy the third plain error requirement—effect on substantial rights—because he can show "a reasonable probability that, but for the error," he would have received a lower sentence. *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016).

"When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id*. at 198. Indeed, this Court formally presumes that a Guidelines error affects the ultimate sentence even in the case of an upward variance because such an error "runs the risk of affecting the ultimate sentence *regardless of* whether the court ultimately imposes a sentence within or outside the range the guidelines suggest." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014) (alteration and quotation marks omitted), *quoted with approval in Molina-Martinez*, 578 U.S. at 192, 203–04.

Here, the district court's mistaken use of § 2A3.1 to compute the offense level for Count Three resulted in the court "mistakenly deem[ing] applicable an incorrect, higher Guidelines range." *Molina-Martinez*, 578 U.S. at 200. "Under the guideline sentencing system, a single sentencing range is determined based on the defendant's overall conduct, even if there are multiple counts of conviction." U.S.S.G. § 1B1.11, background note. In cases like Mr. McGirt's, the single sentencing range is calculated in the following manner:

> The combined offense level is determined by taking the offense level applicable to the Group[12] with the highest offense level and increasing that offense level by the amount indicated in the following table:
>
> | Number of Units | Increase in Offense Level |
> |---|---|
> | 1 | none |
> | 1½ | add 1 level |
> | 2 | add 2 levels |
> | 2½ – 3 | add 3 levels |
> | 3½ – 5 | add 4 levels |
> | More than 5 | add 5 levels |
>
> In determining the number of Units for purposes of this section:
>
> (a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from **1** to **4** levels less serious.

[12] Pursuant to U.S.S.G. § 3D1.2, each of Mr. McGirt's three convictions was treated as its own "Group." *See* R. vol. II at 44–46.

> (b) Count as one-half Unit any Group that is **5** to **8** levels less serious than the Group with the highest offense level.
>
> (c) Disregard any Group that is **9** or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

U.S.S.G. § 3D1.4.

Because the district court applied § 2A3.1 to all three of Mr. McGirt's convictions, it concluded that Mr. McGirt had three equally serious offenses. The court thus added three levels to the highest individual offense level, which was 33. R. vol. II at 46, 63. This produced a combined offense level of 36 and a Guidelines range of 210–262 months' imprisonment for Mr. McGirt's overall conduct. *Id*. at 53.

Had the district court applied § 2A3.4 rather than § 2A3.1 to determine the offense level on Count Three (as it was supposed to do), this would have produced a lower total offense level (35) and a lower Guidelines range: 188–235 months' imprisonment. Under the 1995 version of § 2A3.4(b)(1) and (3), Mr. McGirt's correct offense level for Count Three is 18—not 33. This means that Count Three should not have produced any additional "Units." *See* U.S.S.G. § 3D1.4(c) ("Disregard any Group that is **9** or more levels less serious than the Group with the highest offense level."). As a result, the upward adjustment under § 3D1.4's table should have been two levels, not three levels, and Mr. McGirt's total offense level should have been 35, not 36. The Guidelines range applicable to a total offense level of 35 (with a category II

criminal history) is 188–235 months, not the 210–262 months that the district court used. Thus, as discussed above, the district court's mistaken application of § 2A3.1 to Count Three is presumptively prejudicial. *See Molina-Martinez*, 578 U.S. at 198; *Sabillon-Umana*, 772 F.3d at 1333.

Nothing in the record overcomes the presumption of prejudice. To the contrary, the district court's comments at sentencing serve to reinforce that presumption. Although it ultimately varied upwards from the Guidelines range based on a variety of aggravating circumstances, the district court repeatedly stated that the Guidelines range was a factor in its decisionmaking. The court commented that it had used that 210-to-262-month range as "the starting point and the initial benchmark" for its sentencing decision. R. vol. III at 56–57. It stated that it had decided to impose a life sentence only after assessing whether "the *extent of* th[at] deviation" from the Guidelines range had a "justification [that was] sufficiently compelling to support the *degree of* the variance" from 210 to 262 months. *Id*. (emphasis added) The court later commented that—notwithstanding its decision to vary upwards—it had "considered the sentencing guidelines along with all the factors set forth in Title 18, U.S.C., Section 3553(a) to reach an appropriate and reasonable sentence in this case." *Id*. at 71–72. In addition, the court said that it had "taken into consideration the sentencing guideline calculations contained within the presentence report." *Id*. at 72. In short, the district court's comments at sentencing provide further reason to conclude that the mistaken Guidelines calculation may have affected the result.

The scripted sentence that the judge recited near the end of the hearing does not suggest otherwise. The judge said:

> The Court notes for the record that based upon all presently known facts and legal principles, this is the same sentence the Court would impose if given the broadest possible discretion, and the same sentence the Court would impose notwithstanding any judicial findings of fact by adoption of the presentence report.

R. vol. III at 73–74. A review of the available sentencing transcripts involving Judge Heil since he took office in May of 2020 indicates that Judge Heil reads a literally identical statement into the record at every sentencing hearing. *See* R. vol. III at 66, *United States v. Dodson*, No. 21-7046 (10th Cir.); R. vol. III at 70–71, *United States v. Morgan*, No. 21-5053 (10th Cir.); R. vol. II at 35, *United States v. Zavala-Cervantes*, No. 21-5039 (10th Cir.); R. vol. II at 48, *United States v. Luna*, No. 21-5030 (10th Cir.); R. vol. III at 59, *United States v. Medina-Tamayo*, No. 20-7060 (10th Cir.); Tr. at 26–27, ECF No. 90, *United States v. Ortner*, No. 4:20-cr-00237-JFH (N.D. Okla.). Such boilerplate cannot show that a sentencing error is harmless. *See United States v. Gieswein*, 887 F.3d 1054, 1062–63 (10th Cir. 2018) ("We give little weight to the district court's statement that its conclusion would be the same 'even if all of the defendant's objections to the presentence report had been successful.' Our court has rejected the notion that district courts can insulate sentencing decisions from review by making such statements."). There simply isn't any rote incantation that wards off appellate review.

In any event, the script does not apply on its own terms to Mr. McGirt's claim of sentencing error. Mr. McGirt does not claim that the district court failed to recognize the full extent of its sentencing discretion. R. vol. III at 73 ("same sentence . . . if given the broadest possible discretion"). Nor does Mr. McGirt claim that the court erroneously made or failed to make any judicial findings of fact. *Id*. ("same sentence . . . notwithstanding any judicial findings of fact"). Rather, Mr. McGirt claims that the district court miscalculated the Guidelines range by consulting the wrong offense guideline for Count Three's statute of conviction. And the district court's script does not mention the Sentencing Guidelines, much less indicate that the sentence was imposed without regard to the Guidelines range. *See United States v. Archuleta*, 865 F.3d 1280, 1291 (10th Cir. 2017) (plain Guidelines error satisfied the third prong where "[t]he sentencing judge did not indicate that the sentence was imposed without regard to the calculated Guidelines range"). Indeed, it would have made scant sense for the district court to state at the end of the hearing that the Guidelines range made no difference when the court had already said in the body of its sentencing discussion that the Guidelines range was a significant factor. R. vol. III at 56–57, 71–72.

The unpublished opinion in *United States v. Dotson*, 574 F. App'x 821 (10th Cir. 2014), should not persuade this Court that the district court's script can sweep erroneous Guidelines calculations under the rug. In *Dotson*, a panel of this Court addressed a virtually identical statement from a different judge of the same district court: "The district court stated 'for the record that

this is the same sentence the Court would impose if given the broadest possible discretion, and the same sentence the Court would impose notwithstanding any judicial fact finding occurring by adoption of the Presentence Report or at this hearing.'" *Id*. at 826. In a non-precedential disposition, the *Dotson* panel held that this statement supported holding that a potential Guidelines error was harmless. *Id*. But the *Dotson* panel was not presented with, and did not address, the arguments above. And the arguments above show that *Dotson* is not persuasive—not in general, and certainly not on the particular facts of Mr. McGirt's case.

For all of these reasons, this Court should conclude that the district court's erroneous use of § 2A3.1 to compute the offense level for Count Three affected Mr. McGirt's substantial rights.

4. Fairness, integrity, and public reputation of proceedings.

Based on the foregoing, the fourth plain error prong is also satisfied. "In the ordinary case, as here, the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1911 (2018); *accord Sabillon-Umana*, 772 F.3d at 1333–34 (obvious Guidelines error presumptively satisfies fourth prong). On this record, there are no "countervailing factors" to indicate "that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction" of the Guidelines error. *Id*. at 1909.

* * *

For these reasons, if the Court does not grant a new trial, it should vacate the judgment and remand for resentencing.

Conclusion

This Court should vacate Mr. McGirt's convictions, remand for a new trial, and instruct the district court that prior inconsistent testimony is admissible for the truth of the matter asserted. In the alternative, the Court should vacate Mr. McGirt's sentences, remand for resentencing, and instruct the district court that 18 U.S.C. § 2244(a)(1) (1996) and U.S.S.G. § 2A3.4 (1995) govern the sentencing as to Count Three.

Statement Requesting Oral Argument

Counsel respectfully requests oral argument, which he submits would significantly aid the Court's decision-making process in this case.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that, to the best of my knowledge and belief, formed after a reasonable inquiry, this brief is proportionally spaced and contains 8904 words and therefore complies with the applicable type-volume limitations.

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